

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~721~~ 42

SMALL BUSINESS ADMINISTRATION, PETITIONER,

v.

G. M. McCLELLAN, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Original Print

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Original Print

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No. 6117

SMALL BUSINESS ADMINISTRATION, *Appellant*

v.

G. M. McCLELLAN, TRUSTEE, *Appellee*

IN THE MATTER OF

S. H. BYQUIST, an individual doing business as
WESTERN DISTRIBUTORS, Bankrupt**Statement of Points on Which Appellant Intends to
Rely on Appeal—Filed March 20, 1959**

The appellant, the United States of America, hereby states that in its appeal to the United States Court of Appeals for the Tenth Circuit from the Order and Judgment of January 28, 1959, in favor of the trustee and against the petitioner, it intends to rely upon the following points:

1. The district court erred in denying the Small Business Administration priority with respect to that part of its claim which constituted an indebtedness of the Bankrupt to the Small Business Administration prior to the adjudication of bankruptcy.

2. The district court erred in holding that there was no debt owing the Small Business Administration by the bankrupt until after the adjudication of bankruptcy.

3. The district court erred in approving and affirming the referee's order denying the Small Business Administration a priority on its claim.

2

WILBUR G. LEONARD

*United States Attorney**District of Kansas**Topeka, Kansas**Attorney for Appellant*

3 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

S. H. BYQUIST, an individual, doing business as
Western Distributors, Bankrupt.

SMALL BUSINESS ADMINISTRATION, Claimant,

v.

G. M. McCLELLAN, Trustee.

Bkey. No. 1138-B-1

Proof of Claim in Bankruptcy—Filed Oct. 15, 1957

State of Missouri County of Jackson ss.

GEORGE E. DEPEW, of 911 Walnut Street, in Kansas City, County of Jackson, State of Missouri, being first duly sworn upon his oath deposes and says:

1. That the claimant, the United States of America, is a corporate sovereign and body politic. That the Small Business Administration, whose principal officer is Wendell B. Barnes, Administrator, Small Business Administration, Washington, D. C., maintains its Ninth Regional Office at 911 Walnut Street, Kansas City 6, Missouri, and is a duly authorized agency of the United States of America at all times hereinafter mentioned.

2. That deponent is the duly appointed, qualified and Acting Regional Director of Small Business Administration, an independent agency of the United States Government; that deponent is duly authorized under
4 instrument of authority published in the Federal Register on April 18, 1956 (21 F.R. 2544), incorporating by reference that published August 13, 1954 (19 F.R. 5119), and that published July 17, 1954 (19 F.R. 4433), to make this proof of claim.

3. That above-named bankrupt is fully and duly indebted to said Small Business Administration in the sum of Sixteen Thousand Seven Hundred Eighty-Eight and 42/100 (\$16,788.42) Dollars; said sum represents the total indebtedness due and payable by bankrupt by virtue of the failure to repay to Small Business Administration the

indebtedness arising from the loan made by the Brookville State Bank, Brookville, Kansas, to said bankrupt; said sum consists of Sixteen Thousand Four Hundred Sixty-Two and 31/100 (\$16,462.31) Dollars principal due, and Three Hundred Twenty-Six and 11/100 (\$326.11) Dollars as interest due to but not including October 16, 1957, and that thereafter the daily interest accrual on the principal is \$2.7437.

4. That the consideration of said indebtedness is as follows:

(a) A Note in the principal amount of \$20,000.00, duly executed and delivered to the said bank and thereafter assigned to the Small Business Administration pursuant to the Participation Agreement, attached as "Exhibit A". Attached hereto and made a part hereof and marked "Exhibit B" is a photostatic copy of the above-mentioned Note.

5. That the said S. H. Byquist has defaulted on the terms and conditions of the Note designated as "Exhibit B" and that there is now due and owing the aforesaid sum by virtue of said default.

6. This claim is filed as a Priority Claim.

UNITED STATES OF AMERICA, *Claimant*

By WENDELL B. BARNES, *Administrator*
Small Business Administration

By GEORGE E. DEPEW,
Acting Regional Director

[Seal]

Subscribed and sworn to before me this 15th day of October, 1957.

RITA E. HUTCHIN, *Notary Public*

My Commission expires September 1, 1958.

Filed October 15, 1957 E. R. Sloan, Referee By H. Kerle

Exhibit A to Proof of Claim

United States of America Small Business Administration, Washington 25, D. C.

Participation Agreement (For Immediate Participation by SBA in Loan Made by Bank).

Agreement made this 19th day of November, 1956, by and between Brookville State Bank (Name of bank), Brookville (Name of town), Kansas (State), (hereinafter referred to as "Bank") and Small Business Administration (hereinafter referred to as "SBA"):

Whereas, S. H. Byquist, d/b/a Western Distributors (Name of borrower), Salina (Name of town), Kansas (State), (hereinafter referred to as "Borrower"), has made application for a loan in the amount of \$20,000.00 (hereinafter referred to as "Loan") and SBA desires to purchase a participation of 75 per cent of the Loan or such part thereof as Bank may disburse to Borrower:

Now, Therefore, in consideration of their mutual promises, Bank and SBA represent and agree as follows:

1. Conditions for Disbursement.—Loan shall be disbursed by Bank subject to the terms and conditions set forth in the authorization of SBA dated November 2, 1956, and all amendments and modifications thereof made and sent to Bank prior to the date of the first disbursement on account of the Loan (which authorization and amendments and modifications are hereinafter collectively referred to as "Authorization").

6 2. Purchase of Participation.—SBA, upon written demand by Bank, will purchase from Bank a participation of 75 per cent of each disbursement made by Bank to Borrower on account of the Loan, immediately after such disbursement, for an amount of money equal to the amount of said participation. Immediately upon each such purchase, Bank will execute and deliver to SBA a Participation Certificate on SBA Form 152* evidencing the interest in the Loan so purchased.

3. Voluntary Purchase Privilege.—Bank may at its option at any time purchase SBA's total participating interest in the Loan by giving written notice to SBA

that it will do so ten days after receipt by SBA of said notice. At the time of such purchase, Bank shall pay therefor an amount of money equal to that portion of the amount then owing on account of the Loan (including appropriate adjustment for interest and charges computed to the date of said purchase), which represents SBA's participating interest. Simultaneously with said purchase, SBA shall (a) deliver to Bank each Participation Certificate it received from Bank pursuant to paragraph 2 hereof, (b) release Bank, in a manner satisfactory to Bank, from all liability under this Agreement, and (c) if the Note, collateral and instruments have been transferred to SBA as provided in paragraph 11 hereof, transfer to Bank, without recourse, the Note, collateral and instruments previously received by SBA from Bank, upon receipt by SBA of the Certificate of Interest, delivered pursuant to paragraph 11 hereof.

4. Disposition of SBA Check.—Bank will neither endorse nor transfer any check issued to it by SBA on account of the purchase of SBA's agreed participation in a disbursement to be made by Bank until Bank has disbursed to Borrower the amount it represents it will disburse to Borrower in Bank's requisition to SBA for such check, and Bank will either endorse such check not later than ten days from the date thereof and apply the proceeds thereof in payment of SBA's agreed participation in such disbursement, or will return such check to SBA.

5. Fees and Commission.—Bank has not directly or indirectly charged or received, and will not charge, any bonus, fee, commission, or expense in any form in connection with the making of the Loan, except such charges and expenses for actual services.

6. Sharing of Collateral.—Any and all security or guaranty of any nature which Bank or SBA now holds or may receive further to secure Bank or SBA with respect to the Loan shall secure the interests of both Bank and SBA in the Loan; provided that Bank or SBA may release any collateral other than that required by the Authorization.

7. Assignment of Interest in Loan:—Neither party will assign, in whole or in part, its interest in the Loan without the prior written consent of the other party.

8. First Disbursement.—Prior to the first disbursement to Borrower on account of the Loan, Bank shall receive:

(a) Borrower's Loan Agreement and the Note (on SBA Form 326*) instruments of hypothecation (containing covenants with respect to the payment of taxes and other charges which constitute prior liens on any real or personal property required as collateral and premiums on the insurance policies required pursuant to paragraph 8 (b) hereof) agreements, documents, and evidence required by the Authorization as a condition to such disbursement.

(b) Insurance policies covering the property constituting collateral for the Note against such risks and in such amounts and form and issued by such companies as shall be satisfactory to Bank, containing appropriate loss payable clause in favor of the holder of the Note as its interest may appear.

(c) Opinion of Bank's counsel that: (i) each of the agreements, hypothecations, and documents required by the authorization as a condition to such disbursement is a valid and binding obligation in accordance with its terms and (when recordation or filing is appropriate or requisite) has been duly filed or recorded; and (ii) all hypothecations of collateral (except in so far as they purport to cover after-acquired property) required by the Authorization as a condition to such disbursement constitute valid first liens upon the respective properties and rights covered thereby: Provided, however, That such opinion may reserve appropriate exception with respect to prior liens for taxes not due and payable, prior liens expressly permitted by the Authorization and other matters deemed immaterial by Bank and Bank's counsel.

8 (d) Evidence satisfactory to Bank that there has been no adverse change since the date of the last financial statement submitted by Borrower to Bank in Borrower's financial condition, organization, operations, business prospects, fixed properties or personnel suffi-

ciently serious in the opinion of Bank to warrant withholding disbursement on account of the Loan, or that any such adverse change in Borrower's financial condition has been remedied to the satisfaction of Bank by contributions without liability therefor and/or issuance of shares of Borrower's capital stock and/or loans as to which standby agreements covering principal and interest have been executed substantially in the form of SBA Form 155*.

9. Subsequent Disbursement.—Prior to any subsequent disbursement to Borrower on account of the Loan, Bank shall receive (a) evidence satisfactory to Bank that there has been no adverse change since the date of the latest previous disbursement on account of the Loan in the financial condition, organization, operations, business prospects, fixed properties or personnel of Borrower sufficiently serious in the opinion of Bank to warrant withholding further disbursement on account of the Loan, or that any such adverse change in Borrower's financial condition has been remedied to the satisfaction of Bank in one or more of the methods specified in paragraph 8 (d) hereof, and (b) the instruments of hypothecation, agreements, documents, and evidence (if any) required by the Authorization as a condition to such disbursement; and (c) insurance policies (if additional collateral is required for such disbursement) and opinion of Bank's counsel with respect to such disbursement, in accordance with the provisions of paragraphs 8 (b) and 8(c) hereof, to the extent that said provisions are applicable to the disbursement then being made.

10. Advice to SBA.—Immediately upon making each disbursement to Borrower on account of the Loan, Bank will advise SBA in writing of the date and amount of such disbursement. Immediately upon receipt by Bank of any payment by Borrower of principal of or interest on the Loan, Bank will advise SBA in writing of the date and amount of each such payment. Upon the happening of any default by Borrower under the provisions of the Note or any other agreement in connection with the Loan, coming to the knowledge of Bank, Bank will within ten days thereafter forward appropriate notice thereof to SBA. Bank will at any time and from time to

9 time, forward to SBA such other information and advice in connection with the Loan as SBA may request. If and when requested by SBA, Bank will furnish SBA with a conformed copy of the Note, instruments of hypothecation and all other agreements and documents obtained by Bank in connection with the Loan.

11. Possession of Note and Collateral.—Banks shall, except as provided in paragraph 3 hereof, hold the Note, all the collateral therefor and all instruments delivered in connection therewith: Provided, however, That subsequent to the purchase by SBA of a participation in the Loan and upon written demand Bank shall five days after receipt of said demand transfer to SBA, without recourse, the Note, collateral, and instruments, all of which shall thereafter be held by SBA, and simultaneously therewith SBA shall issue to Bank a Certificate of Interest (on SBA Form 156*) evidencing the interest retained by Bank in the Loan.

12. Administration of Loan.—The holder of the Note shall receive all payments on account of principal of, or interest on, the Loan and promptly remit to the other party its pro rata share thereof determined according to their respective interests in the Loan, shall use due diligence to recover from Borrower all expenses properly incurred by SBA or Bank which are reimbursable by Borrower, and shall remit to the other party its respective share thereof: Provided, however, That such holder shall not (except to the extent permitted by the Authorization) without the prior written consent of the other party (a) make or consent to any alteration in the terms of the Note, collateral, or other instruments; (b) make or consent to any release, substitution, or exchange of any of said collateral; (c) accelerate the maturity of the Note; (d) sell, assign, or transfer any said collateral; (e) sue upon the Note, collateral, or instruments; or (f) waive any claim against Borrower or any guarantor, standby creditor or other obligor in connection with the Loan.

13. Payment of Expenses.—All reasonable expenses incurred by SBA or Bank which are not recoverable from Borrower shall be shared ratably by SBA and Bank in accordance with their respective interests in the Loan.

10 14. Liability and Representations.—Neither party hereto makes any express or implied warranty of any kind with respect to the Loan and neither party shall be liable to the other for any loss, not due to its own gross negligence, but such loss, shall be borne ratably by SBA and Bank in accordance with their respective interests in the Loan.

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

In Witness Whereof, Bank has caused this Agreement to be executed on its behalf by its duly authorized officer or officers and its corporate seal to be hereunto affixed, and Small Business Administration has caused this Agreement to be executed on its behalf by its Regional Director of its Kansas City, Missouri, Regional Office, the day and year first above written.

BROOKVILLE STATE BANK

By

[Seal]

Attest:

SMALL BUSINESS ADMINISTRATION

By

(Title) *Regional Director*

Exhibit B to Proof of Claim

Note (For Limited Loan Participation Only) LLP-261, 398-KC Salina, Kansas (City and State) \$20,000.00 (Date) November 16, 1956.

For value received, S. H. Byquist, d/b/a Western Distributors (hereinafter called "Undersigned"), promises to pay to the order of Brookville State Bank (hereinafter called "Holder"), at its banking house in the city of Brookville, State of Kansas, or at Holder's option,

11 at such other place as may be designated from time to time by the Holder, the sum of Twenty Thousand and no/100 - - - dollars, (Write out amount) with interest

on the unpaid principal computed from the date of each advance to the Undersigned at the rate of six percent per annum, payment to be made in installments, as follows:

Monthly installments, each in the amount of \$624.00; said monthly installments beginning two (2) months from the date hereof; each said monthly installment shall be applied first to interest accrued to the date of receipt thereof and balance to principal of the indebtedness; balance of principal and interest, if any, payable three (3) years from the date hereof.

Payment of any installment of principal or interest owing on this Note may be made prior to the maturity date thereof without penalty.

Affirmative Covenants.—The Undersigned covenants and agrees that, until the payment in full of the moneys owing on this Note, the Undersigned will:

1. Deliver to Holder hereof within 20 days after the end of each fiscal semiannual period, a balance sheet of the Undersigned as of such date and a profit and loss statement of the Undersigned for such fiscal period, certified by an accountant satisfactory to the Holder hereof;

2. Deliver to Holder hereof with reasonable promptness such other financial data at such times and in such form as Holder may request;

3. Pay all taxes, assessments and other governmental charges to which the Undersigned, or the property of the Undersigned, is or shall be subject before such charges become delinquent, except that no such charge need be paid so long as its validity or amount shall be contested in good faith by appropriate proceedings and the Undersigned shall have set up on the books of the Undersigned such reserve with respect thereto as shall be required by sound accounting practices;

12 4. Keep all of the real and tangible personal property of the Undersigned insured in such amounts and against such risks as may be satisfactory to the Holder or as are commonly insured against in the same areas by owners of similar property, and maintain in force policies of insurance, satisfactory to Holder, against liability for damage to persons or property and under all applicable workmen's compensation laws.

5. Use the proceeds of the loan solely for the purposes set forth in the Authorization for the Loan issued by Small Business Administration (hereinafter called "SBA").

6. On demand, reimburse Holder and SBA, respectively, for any and all expenses incurred, or which may be hereafter incurred by Holder or SBA from time to time in connection with or by reason of borrower's application for, and the making and administration of, the loan.

Negative Covenants.—The Undersigned covenants and agrees that, without the prior written consent of the Holder hereof, he will not:

1. Create, assume or otherwise suffer to exist any mortgage, pledge or other incumbrance upon any of the real or tangible personal property of the Undersigned, whether now owned or hereafter acquired, except (a) liens for taxes or other governmental charges not delinquent or being contested in good faith, or (b) purchase money liens upon property acquired after the date of the Note, and other liens upon such property at the time of the acquisition thereof.

2. Undersigned will not, without the prior written consent of Holder and SBA (a) if Undersigned is a corporation, declare or pay any dividend or make any distribution upon its capital stock, or purchase or retire any of its capital stock, or consolidate or merge with any other company, or make any advance, directly or indirectly, by way of loan, gift, bonus, commission, or otherwise, to any company directly or indirectly controlling or affiliated with or controlled by Undersigned, or to any officer, director, or employee of, Undersigned, or of any such company, (b) if Undersigned is a partnership or individual, make any distribution of assets of the business of Undersigned,

other than reasonable compensation for services, or
13 make any advance, directly or indirectly, by way of loan, gift, bonus, commission, or otherwise, to any partner or any of its employees, or to any company directly or indirectly controlling or affiliated with or controlled by Undersigned.

Events of Default.—The indebtedness shall immediately become due and payable, without notice or demand, upon

the appointment of a receiver or liquidator, whether voluntary or involuntary, for the Undersigned or for any of its property, or upon the filing of a petition by or against the Undersigned under the provisions of any State insolvency law or under the provisions of the Bankruptcy Act of 1898, as amended, or upon the making by the Undersigned of an assignment for the benefit of its creditors. Holder is authorized to declare all or any part of the indebtedness immediately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the indebtedness when due; (2) nonperformance by the Undersigned of any agreement with, or any condition imposed by Holder or SBA, or either of them, with respect to the indebtedness; (3) Holder's discovery of the Undersigned's failure in any application of the Undersigned to Holder or SBA to disclose any fact deemed by Holder to be material or of the making therein or in any of the said agreements, or in any affidavit or other documents submitted in connection with said application or the indebtedness, or of any misrepresentation by, on behalf of, or for the benefit of the Undersigned; (4) the reorganization (other than a reorganization pursuant to any of the provisions of the Bankruptcy Act of 1898, as amended) or merger or consolidation of the Undersigned (or the making of any agreement therefor) without the prior written consent of Holder; (5) the Undersigned's failure duly to account, to Holder's satisfaction, at such time or times as Holder may require, for any of the collateral, or proceeds thereof, coming into the control of the Undersigned; or (6) the institution of any suit affecting the Undersigned deemed by Holder to affect adversely its interest hereunder in the collateral or otherwise. Holder's failure to exercise any of its rights under this paragraph shall not constitute a waiver thereof.

Upon nonpayment of interest or any installment of principal when due, the Undersigned and sureties authorize the Holder to sell, at public or private sale, any or all collateral deposited and property pledged to secure the payment of this Note, and apply the proceeds of sale, less expense, to the payment of this Note.

14 The security rights of Holder and its assigns hereunder shall not be impaired by any indulgence, re-

newal, extension, or modification which Holder may grant with respect to the indebtedness or any part thereof, or in respect to the collateral or in respect to any endorser, guarantor, or surety without notice or consent of the Undersigned or any endorser, guarantor or surety.

S. H. BYQUEST, Individually and
d/b/a WESTERN DISTRIBUTORS

I/We hereby guarantee payment of this Note:

Wife

We hereby assign this one certain note to The Small Business Administration without recourse.

THE BROOKVILLE STATE BANK

By

Cashier

IN UNITED STATES DISTRICT COURT

Stipulation Re Exhibits

Comes now John Q. Royce, attorney for the Trustee herein, and William C. Farmer, United States Attorney for the District of Kansas, and stipulate and agree that the following documents may be admitted in evidence in this case as Government exhibits, and marked as follows:

"Government Exhibit A"—Participation Agreement by the Brookville State Bank and SBA.

"Government Exhibit B"—Note on SBA Form 326 signed by the bankrupt.

"Government Exhibit C"—Certified copy of Treasury Check in the amount of \$15,000.00.

"Government Exhibit D"—Application for a loan to SBA signed by bankrupt.

"Government Exhibit E"—Authorization for loan signed by SBA.

"Government Exhibit F"—Written demand for SBA purchase of 75% participation in the loan signed by Brookville State Bank.

15 "Government Exhibit G"—Letter from SBA to Bank enclosing Treasury Check for \$15,000.00.

"Government Exhibit H"—Letter from SBA to bankrupt advising approval of the loan in the amount of \$20,000.00 by SBA.

It is further stipulated and agreed that the Government offers in evidence herein the document marked "Government Exhibit I", an inventory of furniture as of August 7, 1957, signed by S. H. Byquist, and written on the letterhead of "Western Distributors", and the Trustee stipulates and agrees that said document is a full, true and correct copy of the original executed on or about the date it bears and was signed by S. H. Byquist, the bankrupt, and no objection is made by reason of the fact that a copy is offered instead of the original document. The Trustee does object to "Government Exhibit I" for the reason that there are statements thereon which are or may be construed to be opinions and conclusions of the said S. H. Byquist which are not binding on the parties hereto and are expressions of a legal conclusion and invade the province of the Court in this matter; that it is incompetent, irrelevant, immaterial and does not prove, or tend to prove, any matter in issue in this action.

JOHN Q. ROYCE

Attorney for Trustee

WILLIAM C. FARMER

United States Attorney

*Attorney for Small Business
Administration*

[Government's Exhibit A to the stipulation is a participation agreement of November 19, 1956, and is identical with the participation agreement appearing as Exhibit A to the proof of claim reproduced at page 5.]

[Note November 16, 1956, for \$20,000. of S. H. Byquist payable to the Brookville State Bank is not reproduced here since it appears as Exhibit B to the proof of claim appearing at page 10.]

16

Government's Exhibit C

Kansas City, Mo. 2-4 36,919,351 Treasury Division of
Disbursement 10 Treasurer of the United States Through
Federal Reserve Bank of Kansas City 18-4 000 Nov. 23
1956

[Seal] Thesaur. Amer. Septent. Sigil.

Pay \$*15,000 Dollars 00 cts \$*15,000.00*

To the Order of Brookville State Bank Brookville ~~Kans~~
LLP-261,398-KC

Drawn for above object

L. N. LOOKER

254 Regional Disbursing Officer
410

Do not fold, spindle or mutilate Know Your Endorser
Require Identification

Identification Procedure

When cashing this check for the individual payee, you
should require full identification and endorsement in your
presence, as claims against endorsers may otherwise result.

The payee should endorse below in ink or indelible pencil.

If the endorsement is made by mark (X) it must be wit-
nessed by two persons who can write, giving their places of
residence in full.

It is suggested that this check be promptly negotiated.

Pay any Bank, Banker, or Trust Co. or order Previous
endorsements guaranteed The Brookville State Bank
(illegible) Brookville, Kans. 83-756

(illegible) 69 Bank & Trust Co. Nov. 27 '56

17 Buy and Hold U. S. Savings Bonds Safe as America

[Clerk's Note: Endorsements appear on reverse side]

Government's Exhibit D

[Seal] Small Business Administration 1953

United States of America Small Business Administra-
tion Limited Loan Participation Application for Loan

This form is to be used only in applying for a loan in
which the bank will participate to the extent of at least

25 percent and in which the Small Business Administration's share will be no more than \$15,000 or 75% of the total amount of the loan, whichever is the lesser. The maximum maturity on Limited Loan Participation is 5 years and interest shall be no higher than 6 percent per annum.

(For instructions see page 4) LLP-261,398-KC

1. Name and address of applicant (Street, city, zone, and State) S. H. Byquist d/b/a Western Distributors 227 N. Santa Fe Salina, Kansas Received Oct 31 1956 SBA Kansas City Date of application October 8, 1956 Amount of loan requested \$20,000.00 Maturity requested 3 years Date established 4-15-48 Number of employees. (Including subsidiaries and affiliates) 7 Type of Business (Attach history of business on separate sheet) Wholesale Distributor of Radio & Electronic Supplies

2. Amount and Purposes of Loan (Give a brief general statement of need for proposed loan, including in the table below the specific purposes for which proceeds will be used):

General Statement Working Capital. For the purpose of discount on new purchases and accrued accounts payable, and to improve the cost ratio of merchandise purchases.

Purposes (List)	As above.	Amount \$	Total
(This should agree with amount of loan requested)			
		\$20,000.00	

18 3. Proposed method for repayment of loan (State sources of funds and proposed schedule of repayment): Monthly, from business income.

4. Collateral offered (Attach list and description):

5. Names of Attorneys, Accountants, and other Parties. The names of all attorneys, accountants, appraisers, agents, and all other parties (whether individuals, partnerships, association or corporations) engaged by or on behalf of the applicant (whether on a salary, retainer or fee basis and regardless of the amount of compensation) for the purpose of rendering professional or other services of

any nature whatever to applicant, in connection with the preparation or presentation of this application or with any loan to applicant which SBA may make, or in which SBA may participate, as a result of this application, or such loan or participation; and all fees or other charges or compensation paid or to be paid therefor or for any purpose in connection with this application whether in money or other property of any kind whatever, by or for the account of the applicant, together with a description of such services rendered or to be rendered, are as follows:

Name and Address Clark, Mize & Lillard Salina, Kansas
Description of Services Rendered and to be Rendered Legal Counsel as needed. Total Compensation Agreed to be Paid None Compensation Already Paid None

6. Financial Statement as of August 31, 1956, Fiscal Year ends December 31, 1956

(Statement must be dated within 60 days of the filing of this application. Omit \$.00)

(The applicant may submit in lieu of the financial statement prescribed below, a copy of his regularly prepared financial statement dated within 60 days of the filing of this application provided he also supplies the supplementary detail called for on items marked with an asterisk)

19	Assets		
	Cash on hand and in banks	\$	428.63
	*Notes Receivable		
	*Accounts Receivable	*	
	Less Reserve for Doubtful Accounts		37,117.21
	Inventories (How valued)		
	Finished	65,623.46	
	Stock in Process		
	Raw Material		65,623.46
	*Other Current Assets		
	Total Current Assets		\$103,169.30
	*Due from Affiliates or Subsidiaries		
	*Due from Officers, Directors, and Stockholders		
	Life Insurance (CSV)		
	Land		
	*Buildings	*	
	Machinery and Equipment		
	Furniture and Fixtures	4,028.15	
	Autos and Trucks	7,918.39	
	Less Reserve for Depreciation	5,612.91	5,433.63
	*Other Assets		5,450.00
	Total Assets		\$114,052.93

Liabilities	
*Notes Payable Other	\$ 407.10
*Notes Payable to Banks	10,712.50
*Notes to Officers, Directors, and Stockholders	
*Notes to Others	
Accounts Payable for Merchandise	41,394.70
*Accounts Pay. Other	912.40
Income Taxes	
Other Accruals Taxes	458.92
*Other Current Liabilities	
Total Current Liabilities	\$
*Mortgage Debts	
*Other Liabilities	
Total Liabilities	\$
Capital Stock	
Surplus and Undivided Profits	
Capital Account (If individual or partnership)	60,168.21
Total Liabilities and Net Worth	\$114,052.93

20 * Itemize on a separate sheet all items marked with an asterisk. If any of the liabilities shown in the above financial statement are secured, state the amount and to whom owed and itemize collateral pledged as security.

Contingent Liabilities: Accounts or notes receivable discounted or sold with endorsement or guarantee and all other contingent liabilities, including terms of any leases, should be explained on a separate sheet. Also, describe any pending or imminent litigation.

Note.—Submit copy of last available audit or of financial statement at close of last fiscal period (if such date differs from date of above statement).

7. Comparative Statements of Sales, Profit or Loss, etc.

	12-31-54	12-31-55	8-31-56 To Date
If a corporation, use this block:			
Net Sales (Gross sales less returns and allowances)	\$	\$	\$
Net Profit (After depreciation and taxes)			
Depreciation			
Income Taxes			
Compensation of Officers (Included in expenses)			
Dividends Paid			
If a partnership or proprietorship, use this block:			
Net Sales (Gross sales less returns and allowances)	194,591.94	147,365.27	97,273.84
Net Profit (After depreciation)	8,666.24	4,471.02	2,208.30
Depreciation	1,444.50	2,065.31	
Withdrawals (For income taxes)	3,314.52	1,486.54	400.00
Withdrawals (For other purposes)	5,477.00	5,924.74	4,635.55

21

Net Worth Reconciliation

Net Worth-Beginning	70,477.60	70,352.32	67,412.06
Profit or Loss	8,666.24	4,471.02	2,298.30
Dividends			
Withdrawals	8,791.52	7,411.28	5,035.55
Net Change (Increase or decrease)			
Ending Net Worth	70,352.32	67,412.06	60,168.21
			16-72498-1
Notes Payable (Others):	Mason Investment Co.		\$107.10
	Albert Bosch		300.00
			<hr/> \$407.10
Notes Payable (Banks):	Brookville S/B		\$ 1,312.50
	Nat'l. Bk. of Am.		8,000.00
	Planters S/B		1,400.00
			<hr/> \$10,712.50
Accounts Pay. (Others):	Albert Bosch		\$912.40
Accounts Receivable:	Attached		
Other Assets:	Personal Real Estate	\$ 4, (illegible)	
	Personal Cash on Hand	1, (illegible)	
			<hr/> \$ 5,450.00

SBA Form 6a
(6-56)

Small Business Administration Credit Report (For Use of Small Business Administration only)

Furnished in connection with application of S. H. Byquist d/b/a Western Distributors (Name) 227 North Santa Fe (Address) Salina (City) Kansas (State)

In support of this participation loan, there is presented below our opinion as to the applicant and the loan requested (additional sheets may be used):

1. Need for Loan: (Are the requested funds available from assets of applicant or any of its owners or officers?) Working Capital—no other available loan

22 2. Comments on Management, its Experience, Character, and Ability: Several successful years Character good

3. Future Business Prospects and Ability to Repay: We feel the additional money applied for in this loan application will enable him to make enough additional funds to repay the loan as agreed.

4. Adequacy of Collateral (including appraised value): We feel that the inventory figure given in his financial statement is correct as to his inventory.

5. Bank's Previous Credit Experience with Applicant (attach a Commerical Credit Report on applicant, if available): Our previous experience has been very satisfactory. No commercial report available.

6. Have you any knowledge of any traits of character or personal behavior of the applicant or any of its partners, officers, or stockholders which you consider unsatisfactory in any respect? (If "Yes," detail on separate sheet.) No.

7. General Comments: We feel that the applicant is entitled to additional help and should be granted the loan.

The above information is furnished to the Small Business Administration only and solely for the purpose of determining whether or not credit should be extended to this applicant.

BROOKVILLE STATE BANK, BROOKVILLE, KANSAS
(Name and address of bank)

GLENN MASON
(Authorized officer)

Glenn Mason, President

Date October 30, 1956.

(illegible 911023)

SBA Form 6a
(6-56)

Small Business Administration Credit Report (For Use of Small Business Administration only)

23 Furnished in connection with application of S. H.
Byquist, d/b/a Western Distributors (Name) 227
N. Santa Fe (Address) Salina, (City) Kansas (State)

In support of this participation loan, there is presented below our opinion as to the applicant and the loan requested (additional sheets may be used):

1. Need for Loan: (Are the requested funds available from assets of applicant or any of its owners or officers?) For working capital and funds to discount bills.

2. Comments on Management, its Experience, Character, and Ability: We have found Mr. Byquist to be a man of good reputation and integrity, as well as capable and industrious. He has operated this business for over seven years in Salina.

3. Future Business Prospects and Ability to Repay: We are of the opinion that his business prospects will improve, since the recent rains and that he will be able to take care of his obligations in a satisfactory manner.

4. Adequacy of Collateral (including appraised value): We understand you are loaning on an unsecured note. He carries a large stock of new and saleable merchandise.

5. Bank's Previous Credit Experience with Applicant (attach a Commercial Credit Report on applicant, if available): Our credit experience has been satisfactory. We have loaned Mr. Byquist on several occasions and he has paid as agreed.

6. Have you any knowledge of any traits of character or personal behavior of the applicant or any of its partners, officers, or stockholders which you consider unsatisfactory in any respect? (If "Yes," detail on separate sheet.) No.

7. General Comments: Mr. Byquist carries his main account at the National Bank of America, Salina, Kansas. He also has an account with us and has borrowed on several occasions. We believe it is our opinion that he is worthy of any reasonable amount of credit. He bears a good reputation and enjoys a nice business.

24 The above information is furnished to the Small Business Administration only and solely for the pur-

pose of determining whether or not credit should be extended to this applicant.

Extra Credit Report

THE PLANTERS STATE BANK,
Salina, Kansas.

(Name and address of bank)

(illegible) President

(Authorized officer)

Date October 16, 1956.

GPO 911023

8. Information to be furnished as to each officer, partner or proprietor of applicant.

Name S. H. Byquist Date of Birth Jan. 31, 1904 Place of Birth Bloomington, Illinois U. S. Citizen? Yes.

Agreement on nonemployment of SBA personnel. In consideration of the making by SBA to applicant of all or any part of the loan applied for in this application, applicant hereby agrees with SBA that applicant will not, for a period of two years after disbursement by SBA to applicant of said loan, or any part thereof, employ or tender any office or employment to, or retain for professional services, any person who, on the date of such disbursement, or within one year prior to said date, (a) shall have served as an officer, attorney, agent, or employee of SBA and (b) as such, shall have occupied a position or engaged in activities which SBA shall have determined, or may determine, involve discretion with respect to the granting of assistance under the Small Business Act of 1953, or said Act as it may be amended from time to time.

Certification. I hereby certify that:

(a) To the best of my knowledge and belief, neither I nor any officer or partner of the applicant is now or ever has been a member of any organization, party, association, movement, group, or combination of persons which advocates the overthrow or destruction of the Government of the United States, or of any organization, party, association, movement, group, or combination of persons which has adopted a policy advocating, approving, or encouraging commission of acts of force or violence to

bring about the overthrow or destruction of the Constitution of the Government of the United States of America (any reservation, qualifications or exceptions to this certification are set forth by affidavit attached hereto).

(b) To the best of my knowledge and belief, neither I, nor any officer or partner of the Applicant has ever been arrested, charged, held or convicted by any Federal, State or other law enforcement authority for any violation of Federal, State (including U. S. territories and possessions), county or municipal law, regulation or ordinance, excluding traffic violations (any reservation, qualifications, or exceptions to this certification are set forth by affidavit attached hereto).

(c) The applicant has not paid or incurred any obligation to pay, directly or indirectly, any fee or other compensation for obtaining the loan hereby applied for, and has not paid or will not make any payment for services in connection with this application, without the consent of the Small Business Administration.

All information contained above and in exhibits attached hereto are true and complete to the best knowledge and belief of the applicant and are submitted for the purpose of inducing SBA to grant a loan, or to participate in a loan by a bank or other lending institution, to applicant. Whether or not the loan herein applied for is approved, applicant agrees to pay or reimburse SBA for the cost of any surveys, title or mortgage examinations, appraisals, etc., performed by non-SBA personnel with consent of applicant.

Proprietorship
(Individual, general partner,
trade name or corporation)

[Seal]

By S. H. BYQUIST

Attest

(Title)

Title Proprietor

26. Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment

of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the SBA, or for the purpose of obtaining money, property, or anything of value, under the Small Business Act of 1953, as amended, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both.

(For use only by bank or other financial institution)

Application for Participation Agreement. We propose to make a (check one): Deferred participation loan X Immediate participation loan with bank to make and service to the Applicant named on page 1 of this application, provided SBA will participate in the loan to the extent of 75 percent. We hereby make application for the type of participation agreement checked above subject to the following loan conditions (use separate sheet if necessary):

Interest to be payable monthly at the annual rate of 6 percent on the loan.

Without the participation of SBA to the extent applied for we would not be willing to make this loan. In our opinion, the financial assistance applied for is not otherwise available on reasonable terms.

BROOKVILLE STATE BANK
(Name and address of bank)
Brookville, Kansas

GLEN: MASON
(Authorized officer)
President

Date October 30, 1956

Government's Exhibit E

United States Government Small Business Administration
Kansas City Regional Office 911 Walnut Street Kansas
City 6, Missouri Immediate Participation

Authorization

This Administration is authorized (pursuant to Section 207(a) of the Small Business Act of 1953, as amended)

to enter into a Participation Agreement on SBA Form 136 with Brookville State Bank, Brookville, Kansas, (hereinafter called "Bank"), for the purchase from Bank through the Regional Office of this Administration at Kansas City, Missouri, of an immediate participation of 75% of the Loan to be made by Bank to S. H. Byquist, D/B/A Western Distributors, Salina, Kansas, (hereinafter called "Borrower"), on Borrower's Application dated October 8, 1956, and Bank's Application dated October 30, 1956, Docket No. L.P.-261.398-KC. The Participation Agreement is to be executed in behalf of this Administration by the Regional Director of said Regional Office, and the Loan is to be in the amount and disbursed subject to the conditions (in addition to the conditions set forth in the Participation Agreement and the written instructions, if any, of Regional Director to Bank) as follows:

1. Amount: Twenty Thousand Dollars (\$20,000.00).

2. Note Payable:

Three (3) years from date of Note, with interest at the rate of six per cent (6%) per annum, and installments, including principal and interest, each in the amount of \$624.00, payable monthly, beginning two (2) months from date of Note, and the balance of principal and interest payable three (3) years from date of Note; with the further provision that each said installment shall be applied first to interest accrued to the date of receipt of said installment, and the balance, if any, to principal.

3. Collateral:

First Mortgage of all equipment (excluding automotive equipment), fixtures and furniture now owned and hereafter acquired by Borrower (including, but not limited to (i) the equipment (excluding automotive equipment), fixtures and furniture referred to in Applicant's Financial Statement and stated therein to have a total book value of \$4,028.00 as of August 31, 1956).

28 4. Use of Proceeds of Loan:

\$20,000.00 solely for operating expenses of Borrower.

5. Total annual withdrawals of Borrower from his said business to be limited to \$4,000.00 plus such additional amounts as may be necessary to pay income taxes on the profits of said business.

6. Note and all instruments of hypothecation to be executed by Applicant and wife.

7. Prior to each disbursement on account of the Loan, Bank shall be in receipt of evidence satisfactory to it in its sole discretion, that there has been no Adverse Change since the date of the Application, or since any of the preceding disbursements, in the financial or any other condition of Borrower, which would warrant withholding or not making any such disbursement or any further disbursement.

8. Such other conditions not inconsistent with the provisions of this Authorization or of the Participation Agreement as may be imposed by Bank and Regional Director.

9. Disbursement of the Loan shall be made in the discretion of Bank in accordance with the provisions of this Authorization and the Participation Agreement, provided that no disbursement shall be made after a date four months from the date hereof.

The foregoing Authorization is issued pursuant to the approval of the Loan Application by the Small Business Administration on November 2, 1956.

WENDELL M. BARNES, *Administrator*

By WALLACE M. BUCK

Acting Regional Director

Small Business Administration

Regional Director's Action No. 2323

29

Government's Exhibit F

Small Business Administration 911 Walnut Street Kansas City 6, Missouri Date: November 16 1956

Re: LLP-261,398-KC S. H. Byquist, d/b a Western Distributors Salina, Kansas

Gentlemen: We are ready to make full disbursement in the amount of \$24,000.00 on account of the subject loan and submit herewith our written demand on SBA Form 191 for your purchase of your agreed participation of 75% of such disbursement, pursuant to the provisions of paragraph 2 of our Participation Agreement with you on SBA Form 136 dated November 16, 1956.

In our opinion, our bank has complied with all of the conditions of the Participation Agreement and of the Authorization of Small Business Administration approved November 2, 1956 in connection with the subject loan; which are required to be fulfilled prior to first disbursement to the Borrower on account of the loan.

Yours very truly,

BROOKVILLE STATE BANK

Brookville, Kansas

By R. D. POWER

Cashier

Government's Exhibit-G

Small Business Administration Federal Office Building 911 Walnut Street Kansas City 6, Missouri November 21, 1956

Brookville State Bank, Brookville, Kansas Attention: Glenn Mason, President Re: LLP-261, 398-KC S. H. Byquist, a/b a Western Distributors Salina, Kansas

Gentlemen: Reference is made to your letter dated November 16, 1956 submitting for our examination and review copies of the closing documents for our files in connection with the subject loan.

Examination of the instruments indicates that they are properly drawn and in order. We are returning herewith

the original Participation Agreement for bank's files, which has been dated and signed by the Regional Director.

Predicated on your certification and written demand made upon Small Business Administration under the provisions of Paragraph 2 of the Participation Agreement dated November 19, 1956, there is enclosed for purchase of this Administration's agreed participation in the full disbursement which you will make on account of the loan.

United States Treasury Check No. 36,919,351 dated November 23, 1956, payable to the order of your bank in the sum of \$15,000.00.

This check is to be accepted and negotiated by your bank only under the following conditions:

1. That the amount disbursed on account of the loan is the entire amount of the loan, \$20,000.00.
2. That the proceeds of the check will be used solely for the purchase by Small Business Administration of its agreed participation of 75 per cent of the amount disbursed by your bank on account of the loan.
3. That your bank will concurrently with the acceptance of this check execute and deliver to Small Business

Re: LLP-261,395-KC - 2 - November 21, 1956

Administration a Participation Certificate on SBA Form 152 evidencing the interest of Small Business Administration in the loan so purchased.

The Participation Certificate (SBA Form 152) is enclosed, in duplicate, to be completed by you to show the date of the disbursement, then dated at the bottom of the Certificate (not earlier than the date of the disbursement) and executed by an authorized official of your bank, thereafter the original to be returned to this office. Retain the copy for bank's files.

31 SBA Form 172 is used when the bank reports its monthly repayments and remits therefor to Small Business Administration in payment of its proportionate share of such repayment. Submit in duplicate and be careful that the form is fully complete as to dates, etc. A supply of these forms is enclosed for your use.

Please acknowledge receipt of the enclosed check on the

carbon copy of this letter attached. This is necessary in order for us to determine the purchase of our participation.

Sincerely yours,

WALLACE M. BUCK, *Chief -*
Financial Assistance Division

Receipt is hereby acknowledged of United States Treasury Check No. 36919351 dated November 23, 1956, payable to the Brookville State Bank, Brookville, Brookville, Kansas, in the amount of \$15,000.00, this 23 day of November 1956.

BROOKVILLE STATE BANK
By R. D. BOWER
Cashier

Government's Exhibit H

Baltimore 1-700 Ext 8-767 November 2, 1956

Mr. S. H. Byquist, d b a Western Distributors 227 N. Santa Fe Salina, Kansas Re: LLF-261.398-KC.

Dear Mr. Byquist: This will advise you that Small Business Administration today approved your application for an immediate participation loan in the amount of \$20,000.

The approval is subject to terms and conditions which will be included in a Loan Authorization to be issued by this office and forwarded to you at a later date.

Sincerely yours,

C. I. MOYER
Regional Director

CC Brookville State Bank, Brookville, Kansas
2 cc Fiscal

Government's Exhibit I

Western Distributors Wholesale Distributors of Radio and Electronic Supplies Home Office - Salina, Kansas

Stan Byquist

Page 1 Inventory of Furniture as of August 7, 1957

7 Moore ticket machines 1 Office radio National Union 1 Office clock Sylvania 2 Four drawer metal boxes 1 Small safe 1 Wooden Adjustable office chair 2 Four shelf Gray steel storage cabinet 1 Wooden card file 2 Metal card file 1 Wood file cabinet 4 drawer green 2 Wire invoice baskets 1 Gray pencil sharpener 1 Permal tape machine 1 Pitney Bowes postage machine 1 postage scale 1 Cameco 5 ton air conditioner 1 Wooden 6 drawer desk 1 Wooden chair with arms 1 Wooden chair with arms and rollers 1 Gray metal table 2 metal waste baskets 1 Metal desk 5 drawers 1 Invoice rack 3 shelves 2 Metal four drawer file 1 desk lamp 1 Underwood Sundstrand Adding Machine 932459 1 Masco WF2 Intercom 2 Metal typewriter stands 1 Large Double wood desk 1 *Erective* Metal Chair 1 Swingline stapler 2 Two door storage cabinets 1 Dalton Adding Machine 1 Underwood Typewriter 1 Underwood upright Typewriter 1 *Erective* chair with arms and rollers 1 Bostish stapler 1 Leather covered lounge chair 1 5 drawer storage cabinet 1 four drawer file cabinet 1 Lounge chair leather covered 1 Gray metal five drawer desk 1 Metal cash box 4 wooden plastic covered stools 1 Metal table

The undersigned, S. H. Byquist, does hereby surrender and deliver unto The Brookville State Bank, Brookville, Kansas, and the Small Business Administration, an agency of the United States government, the foregoing tabulated office furniture and fixtures, it being understood that said bank and said agency are the owners and holders of a valid lien on said property. The undersigned hereby authorizes said bank and said agency to lease the use of said property unto G. M. McClellan, to be appointed liquidating agent for the said S. H. Byquist, under such terms and conditions deemed appropriate by said bank and said agency for a period of not to exceed nine months from date and that

the net proceeds of such lease shall be applied to the indebtedness of the undersigned unto said bank

and said agency, and that when and if said bank and said agency fail to lease said property, that they may proceed to sell the same without notice to the undersigned and apply the net proceeds from the sale thereof upon said debt. Dated at Salina, Kansas, this 7th day of August, 1957.

S. H. BYQUIST

IN UNITED STATES DISTRICT COURT

**Memorandum in Support of Objection to the Claim of the
United States of America**

FACTS

There is no dispute as to the material facts involved in this claim.

On November 19, 1956, the Small Business Administration and the Brookville State Bank, Brookville, Kansas, entered into a Participation Agreement between themselves whereby it was agreed that the Bank would make a loan to the bankrupt in the amount of \$20,000.00, in which SBA would participate. The Participation Agreement is attached to the Proof of Claim filed herein as Exhibit "A".

By the Participation Agreement, the Small Business Administration agreed that it would, through funds received from the United States Treasury, upon written demand by the Bank purchase from the Bank a participation of 75% of the amount of the loan, or the amount of \$15,000.00. It was further agreed that any losses sustained as a result of this loan would be shared ratably between the Small Business Administration and the Brookville State Bank in accordance with the respective interests in the loan, or on a 75 - 25% basis.

On November 23, 1956, the Treasurer of the United States through the Federal Reserve Bank, Kansas City, Missouri, issued a check to the Brookville State Bank for \$15,000.00, representing 75% of the loan; the Brookville State Bank put up \$5,000.00 and made a loan in the full amount of \$20,000.00 to the bankrupt.

The loan was evidenced by a Promissory Note dated November 16, 1956, payable to the order of the Brookville

State Bank, Brookville, Kansas, in the face amount of \$20,000.00, with interest at the rate of 6% per annum on the unpaid principal and requiring payment in monthly installments in the amount of \$624.00; each monthly installment to be applied first to interest accrued to date of receipt thereof, and the balance to principal of the indebtedness; the entire principal balance and interest, if any, payable three years from the date of said note. Said note is attached to the Proof of Claim filed herein as Exhibit "B".

On September 5, 1957, the bankrupt was adjudicated in bankruptcy.

After bankruptcy proceeding was instituted, the Brookville State Bank assigned its interest in said loan to the Small Business Administration, who duly filed a Proof of Claim in bankruptcy for the full amount of the principal due both to it and to the Brookville State Bank.

As of November 22, 1957, after all due credits were given on the loan, there remained due to both the Brookville State Bank and the Small Business Administration the sum of \$16,355.69; interest having been paid thereon only to the date of adjudication in bankruptcy.

There is now unpaid on said note to the Small Business Administration the sum of \$12,266.77, and to the Brookville State Bank the sum of \$4,088.92.

The total gross estate herein is approximately \$19,527.00.

Claims have been filed herein totaling \$43,682.07.

Costs of administration for this estate are estimated at approximately \$6,500.00.

• • • • •

**Brief in Support of Claim of United States of America—
Filed June 26, 1958**

FACTS

In addition to the facts heretofore stipulated to between the Trustee and the United States, and which are set forth in the Trustee's brief, the United States also calls the Court's attention to Government Exhibits A through

I, which have been admitted in evidence by stipulation of the parties hereto.

* * * *

Filed June 26, 1958 E. R. Sloan, Referee

IN UNITED STATES DISTRICT COURT

**Memorandum Opinion of Referee on the Priority of Claim of
Small Business Administration—June 26, 1958**

At Topeka, Kansas, on May 21, 1958, this cause came on for hearing on the application of the trustee, asking the court to determine the priority status, if any, of Claim No. 49 of the Small Business Administration, the trustee appearing by his attorney, John Q. Royce, and the Small Business Administration appearing by the District Attorney.

It was agreed in open court that there were no disputed facts in the case, and that the case should be submitted on written briefs. The briefs have been filed and have received due consideration.

This case was commenced August 17, 1957 by the filing of an involuntary petition in bankruptcy. Thereafter, on the 5th day of September, 1957, the alleged bankrupt was adjudged a bankrupt. The first meeting of the creditors was held October 22, 1957, and G. M. McClellan was duly appointed trustee. The trustee has proceeded with the liquidation of the estate and has in his hands as a result thereof \$19,016.03.

On October 15, 1957, George E. Depew, Acting Regional Director of the Small Business Administration, filed
36 a proof of claim in which he alleged that there is due and owing the Small Business Administration the sum of \$16,788.42. It is alleged that the consideration for the claim is a promissory note in the amount of \$20,000.00 given by the bankrupt to the Small Business Administration in accordance with a participation agreement entered into on November 19, 1956, between the Brookville State Bank and the bankrupt.

Under the terms of the participating agreement the Small Business Administration obligated itself to partici-

pate in the loan of \$20,000.00 to the extent of 75% thereof, and on November 23, 1956, upon the check of the regional distributing office on the Treasurer of the United States, \$15,000.00 was paid to the Brookville State Bank.

On November 22, 1957, after all due credits were given on the loan there remained due to both the Brookville State Bank and the Small Business Administration the sum of \$16,355.69, with interest paid to the date of bankruptcy. That there is due and owing under the agreement and promissory note the Small Business Administration the sum of \$12,266.77, and the Brookville State Bank the sum of \$4,088.92.

The sole question to be determined is whether the Small Business Administration has a priority or an unsecured claim.

The distribution of an estate in bankruptcy is controlled by the Bankruptcy Act. Claims are generally classified secured (Sec. 1(28)), priority (S. c. 24) and unsecured (Sec. 65). Priorities as defined in the Act include "(5) debts owing any person, including the United States, who by the laws of the United States is entitled to priority". Priorities are granted only to claims that come within the provisions of the Act. It is settled that the status of a claim against the bankrupt is fixed the date the petition is filed. (*Sexton v. Ereyfus*, 219 U.S. 399; *U.S. v. Marxen*, 307 U.S. 200; *Goggin v. Labor Division*, 336 U.S. 118)

Sec. 31 U.S.C. 191 which provides that in case of insolvency of any person indebted to the United States, the debt due to the United States shall be first satisfied does not apply in bankruptcy cases. (In *re Taylor Pratt Aviation Corp.*, 168 F. 2d 808, and cases there cited) The

Bankruptcy Act provides that debts owing to any
37 person, including the United States, who is entitled to a priority shall have a fifth priority in the order of payment. A debt due the United States is therefore entitled to a classification of a fifth priority. (Sec. 64a(5)) But no priority is given to wholly owned government corporation by 31 U.S.C. 191. (*Sloan Shipyard Corporation v. United States Shipping Board*, 258 U.S. 549) The United States doing business through a corporation does not extend its sovereign immunities or its priorities to such corporation unless specifically granted. (*United States v.*

Edgerton and Sons, 178 F. 2d 763; *R.F.C. v. J. G. Menihan Corp.*, 312 U.S. 81; *Harlingen Canning Co., v. C.C.C.*, 93 F. Supp. 45; *United States v. Paddock*, 187 F. 2d 271. *Nathanson v. N.L.R.B.*, 344 U.S. 25)

This brings us to the question of the status of the Small Business Administration.

The Act bringing into being the Small Business Administration became effective July 30, 1953. It is now Title 15, U.S.C., 631 to 651 inclusive. It creates an agency under the name, "Small Business Administration," which administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the federal government. The management of the Administration is vested in an administrator appointed by the President. He is authorized to obtain money from the Treasurer of the United States for use in the performance of the powers and duties granted to or imposed upon him by law, for which he must account with interest at the end of each fiscal year. He may enter into contracts, buy and sell property and sue and be sued in any court of record of a state having general jurisdiction or in any United States District Court.

It would appear that the granting of these various powers makes the Small Business Administration a legal entity. It seems to fit into what the Supreme Court said in *R.F.C. v. Menihan Corp.*, supra, in which it said:

"While it acts as a governmental agency in performing its functions (see *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32, 33), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. . . ."

38 We have carefully examined the Act creating the "Small Business Administration" and we are unable to find and our attention has not been called to any provision in the Act purporting to give it a priority, or to vest it with privileges and immunities of the United States. The debt in question is owing to Small Business Administration for which it must account to the Treasurer of the United States. It is not given a priority under the laws of the United States.

We are, therefore, brought to the conclusion that the

claim of Small Business Administration is not entitled to a priority, but may be allowed only as an unsecured claim.

It Is So Ordered.

Dated this 26th day of June, 1958.

E. R. SLOAN

Referee in Bankruptcy

Filed June 26, 1958 E. R. Sloan, Referee

IN UNITED STATES DISTRICT COURT

**Petition for Review of Order Denying Priority of Small
Business Administration Claim—Filed June 30, 1958**

Comes now William C. Farmer, United States Attorney for the District of Kansas, and files herewith a Petition for Review of the Order of the Referee dated June 26, 1958, denying priority to the claim of the Small Business Administration, the same being Claim No. 49, and respectfully represents to the Court that the United States feels that the Honorable E. R. Sloan, Referee in Bankruptcy herein, erred to the prejudice of this petitioner in his conclusion that the claim of the Small Business Administration is not entitled to priority but may be allowed only as an unsecured claim.

It is shown to the Court that there is no dispute as to the facts of this case. The bankruptcy case was commenced on August 17, 1957, and the bankrupt was adjudicated a

bankrupt on September 5, 1957, with the first meeting
39 of creditors being held on October 22, 1957. The

Small Business Administration timely filed a claim in the bankruptcy action alleging that there was due the Small Business Administration the sum of \$16,788.42. This claim arose out of a loan which the Small Business Administration and the Brookville State Bank made to the bankrupt in the amount of \$20,000.00 and in which the Small Business Administration had a Participation Agreement in which they participated in the loan to the extent of 75%. The Small Business Administration gave to the Brookville State Bank a Treasury Check in the amount of \$15,000.00 as their proportionate share, and there was at the time of bankruptcy due the Small Business Admin-

istration the sum of \$12,266.77 and the balance was due the Brookville State Bank. The sole question to be determined is whether the Small Business Administration is entitled to a priority or only an unsecured claim.

Wherefore, petitioner prays the Court to review the findings and conclusions of the Referee on the matters herein set forth, correcting the errors herein alleged, and that the Referee herein certify the said question to the Court for that purpose and that he send up with said Certificate the exhibits introduced by the Government and the Stipulation of the parties herein.

WILLIAM C. FARMER
United States Attorney
Attorney for the United States

Filed June 30, 1958.

IN UNITED STATES DISTRICT COURT

**Certificate of Referee to Judge on Petition for Review—
 Filed June 30, 1958**

The Referee in Bankruptcy for the District of Kansas hereby certifies that in the course of the proceedings in the above entitled case the question of the classification of the claim of the Small Business Administration came on for consideration.

The court held upon hearing that the claim should be classified as an unsecured claim.

40 Thereafter, and within the time given by the Referee, a petition for review was filed asking that the order be reviewed by the Judge.

Accompanying this certificate of the Referee are:

1. Petition for review.
2. Memorandum opinion, including findings and order.
3. Briefs of attorneys.
4. Stipulation as to facts.
5. Proof of claim No. 49.

Dated this 30th day of June, 1958.

E. R. SLOAN
Referee in Bankruptcy

Filed July 1, 1958, Harry M. Washington, Clerk By
 Elizabeth C. Rion Deputy.

IN UNITED STATES DISTRICT COURT

Opinion--Filed Dec. 30, 1958

Stanley, Jr., Judge: The United States has petitioned for review of an order of the referee in bankruptcy denying priority to a claim of the Small Business Administration.

This case was commenced on August 17, 1957, by the filing of an involuntary petition in bankruptcy. Byquist was adjudged a bankrupt on September 5, 1957. On October 22, 1957, a trustee was duly appointed. The trustee has proceeded with the liquidation of the estate and has in his hands a sum in excess of \$19,000.00.

On October 15, 1957, the claim here involved was filed. Omitting the caption and verification, it reads:

41 "1. That the claimant, the United States of America, is a corporate sovereign and body politic. That the Small Business Administration, whose principal officer is Wendell B. Barnes, Administrator, Small Business Administration, Washington, D. C., maintains its Ninth Regional Office at 911 Walnut Street, Kansas City 6, Missouri, and is a duly authorized agency of the United States of America at all times hereinafter mentioned.

"2. That deponent is the duly appointed, qualified and Acting Regional Director of Small Business Administration, an independent agency of the United States Government; that deponent is duly authorized under instrument of authority published in the Federal Register on April 18, 1956 (21 F.R. 2544), incorporating by reference that published August 13, 1954 (19 F.R. 5119), and that published July 17, 1954 (19 F.R. 4433), to make this proof of claim.

"3. That above-named bankrupt is fully and duly indebted to said Small Business Administration in the sum of Sixteen Thousand Seven Hundred and Eighty-Eight and 42/100 (\$16,788.42) Dollars; said sum represents the total indebtedness due and payable by bankrupt by virtue of the failure to repay to Small Business Administration the indebtedness arising from the loan made by the Brookville State Bank, Brookville, Kansas, to said bankrupt; said sum consists of Sixteen Thousand Four Hundred Sixty-Two and 31/100 (\$16,462.31) Dollars principal due, and

Three Hundred Twenty-Six and 11/100 (\$326.11) Dollars as interest due to but not including October 16, 1957, and that thereafter the daily interest accrual on the principal is \$2.7437.

"4. That the consideration of said indebtedness is as follows:

"(a) A Note in the principal amount of \$20,000.00, duly executed and delivered to the said bank and thereafter assigned to the Small Business Administration pursuant to the Participation Agreement, attached as 'Exhibit A'. Attached hereto and made a part hereof and marked 'Exhibit B' is a photostatic copy of the above-mentioned Note.

42 "5. That the said S. H. Byquist has defaulted on the terms and conditions of the Note designated as 'Exhibit B' and that there is now due and owing the aforesaid sum by virtue of said default.

"6. This claim is filed as a Priority Claim.

UNITED STATES OF AMERICA, *Claimant*
By WENDELL B. BARNES, *Administrator*
Small Business Administration

By [s] GEORGE E. DEPEW
George E. Depew,
Acting Regional Director

The facts are not disputed. The bankrupt had applied to the Brookville State Bank of Brookville, Kansas, for a loan in the amount of \$20,000.00. After various conferences and examination of reports submitted to the Small Business Administration, a participation agreement was entered into between the bank and the Small Business Administration under the provisions of which the Small Business Administration agreed to participate to the extent of 75% of the loan. In compliance with the agreement, Small Business Administration paid over to the Brookville State Bank the sum of \$15,000.00 by a draft drawn on the Treasurer of the United States. The bank then loaned the money to the bankrupt and a negotiable instrument was executed by the bankrupt solely to the bank for the full amount of the loan. The instrument did contain

certain conditions which referred to the Small Business Administration but there was nothing on the instrument to indicate that Small Business Administration was to be considered as a payee. Following the bankruptcy of the borrower, the bank assigned the note to the Small Business Administration. (The Government concedes that "the interest of the bank, which was 25% of the loan, was assigned to SBA subsequent to the date of bankruptcy.")

The distribution of an estate in bankruptcy is controlled by the Bankruptcy Act, 11 U.S.C.A. §§ 1-1255. Thus, it has been determined that the general provisions of 31 U.S.C.A. § 191 are not applicable in bankruptcy proceedings to permit any debts owing to the United States to be paid before any other debt. In *re Taylorcraft Aviation Corporation*,

168 F. 2d 808 (6 Cir. 1948). Section 104 of 11 U.S.C.A. (§ 64, Bankruptcy Act) provides that debts

owing to the United States are to be given a priority if by the laws of the United States the debt would have been entitled to a priority. A debt due the United States of the class involved here would be classified as a fifth priority debt when a claim is made in bankruptcy proceedings. In *re Weil*, 39 F. Supp. 618 (M.D. Pa. 1941).

The referee in denying the priority to Small Business Administration based his decision upon the fact that priority is not granted to debts owing to a corporation even though the corporation be solely owned by the United States. *Sloan Shipyards v. U. S. Fleet Corp.*, 258 U.S. 549 (1922); 66 L. Ed. 762; 42 S. Ct. 386; *R. F. C. v. Menihan Corp.*, 312 U.S. 81 (1941); 85 L. Ed. 595; 61 S. Ct. 485. There is a distinction between the cited cases and the case in question—in the cited cases there was an actual corporation which was representing the federal government. This distinction has been recognized. *Remington on Bankruptcy*, Vol. 6 at page 459 states:

"A branch or agency of the federal government, not set up as a distinct corporation but only as an operative medium, such as an 'administration,' 'authority,' 'bureau,' 'commission,' or the like, though it may be invested with certain corporate powers such as the power to sue and be sued, is regarded as the government itself and, as such, entitled to the general priority accorded to debts due the government from an insolvent under 31 U.S.C.A. § 191."

Courts have also recognized the distinction between a corporate agency and an administration. In *Korman v. Federal Housing Administrator*, 113 F. 2d 743 (D.C. Cir. 1940), the court permitted the FHA to be given a priority. As to the provisions in the Code permitting the FHA to sue and be sued, the court stated that this did not operate to create a separate corporate entity but rather operated to remove the immunity of the sovereign to suit. The court rejected the argument that the provision for suit was sufficient to make the FHA a separate legal entity. For other court recognition of this distinction see: *In re Miller*, 105 F. 2d 926 (2nd Cir. 1939); *In re Hansen Bakeries*, 103 F. 2d 665 (3rd Cir. 1939); *Wagner v. McDonald*, 96 F. 2d 273 (8th Cir. 1938).

44 There is nothing in the act creating the Small Business Administration to indicate that it was to be a separate corporation. 15 U.S.C.A. §§ 631-651. The Administration is given certain powers which are generally possessed by corporate agencies or by separate legal entities. However, *Wagner v. McDonald*, *supra*, indicates that mere possession of these powers would not be considered sufficient to prevent the agency in question from being an "administrative" agency, as compared to a "corporate" agency.

In *Nathanson v. Labor Board*, 344 U.S. 25 (1952); 97 L. Ed. 23; 73 S. Ct. 80, where the court denied priority to the NLRB on its claim in bankruptcy proceedings, it could not be claimed that denial was not proper since no benefit would accrue to the United States if a priority were allowed. The NLRB had made an order requiring additional payments to be made to certain employees and the claim of the NLRB was based upon this order. There was no side contract requiring the NLRB to make the payments to the employees; all money received from the estate would have been distributed directly to the employees.

The referee believed that the powers which were granted to the Small Business Administration fell within the case of *R.F.C. v. Menihan Corp.*, *supra*, where the court said at page 83: "While it acts as a governmental agency in performing its functions (see *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32, 33), still its transactions are akin to those of private enterprises and the mere fact that

it is an agency of the government does not extend to it the immunity of the sovereign. * * *. The force of this language is diminished when it is remembered that this statement was directed at a "corporate" agency of the government.

The purposes of the FHA and the Small Business Administration are quite similar in that both are designed to bolster the economy by providing funds for housing and business needs respectively. There are differences in the two administrations but there is nothing to indicate that Congress intended the Small Business Administration to be treated in a different manner from that accorded the FHA. Congress would have been cognizant of the problem of priority of claims presented by the federal agencies in bankruptcy proceedings and that the "corporate" 45 agencies have been denied the priority. Yet there was nothing in the act to indicate that Congress intended it to be treated other than as an "administrative" agency which has been permitted priority. See *Korman v. Federal Housing Administrator*, supra.

However, whether or not the Small Business Administration is to be considered as a separate entity is not believed to be of controlling importance here. It appears that the debt due the Small Business Administration did not arise until after the adjudication in bankruptcy. The note executed by the bankrupt was made payable to the bank, the Small Business Administration paid over its money to the bank; the bank paid the total amount of the loan to the bankrupt, and all payments on the loan were to be made to the bank. The bank was the sole payee. By the very terms of its own form Small Business Administration was not made a party-lender. The only connection it had with the loan was by virtue of its agreement to participate which was made, not with the bankrupt so as to obligate him to the Small Business Administration, but with the bank. Until the assignment of the note by the bank to the Small Business Administration there was no means by which Small Business Administration could force the bankrupt to make any payments to it even in the event that the bank refused to carry through the agreement between the bank and Small Business Administration.

In the leading case of *United States v. Marxen*, 307 U.S.

200 (1939); 83 L. Ed. 1222; 59 S. Ct. 811, it is firmly established that the rights to or status of a claim against the bankrupt's estate is determined on the date the petition is filed and an assignment after that date gives the assignee no greater rights than the assignor possessed prior to the assignment." *Kerman v. Federal Housing Administrator*, *supra*. In the case at bar the Small Business Administration has conceded that the assignment of "the bank's interest" was made after the filing of the petition. There is nothing in the record to indicate that any separation of the loan had been made and the only assignment was of the entire note. The assignment is found on the note executed by the bankrupt to the bank and it does not purport to assign only the bank's interest but assigns "this one certain note."

46 The referee properly denied the Small Business Administration a priority on its claim since it is conceded that the assignment by the bank occurred subsequent to the filing of the petition.

The order of the referee is approved and affirmed for the reasons herein stated.

Counsel for the trustee will prepare and submit an appropriate order.

Filed December 30, 1958.

IN UNITED STATES DISTRICT COURT

Order Affirming Referee—June 28, 1959

Now on this 12th day of September, 1958, the above entitled matter comes on for hearing before the Court on the petition for review of the order of the referee dated June 26, 1958, denying priority to the claim of the Small Business Administration, the Trustee appearing by John Q. Royce, his attorney, and the petitioner appearing by Wilbur G. Leonard, United States Attorney, its attorney.

Thereupon, it is shown to the Court that there are no disputed facts in this matter, and the facts as stipulated by the parties before the Referee may be received by the Court as the facts herein.

Thereupon, the Court requests that briefs be filed with the Court by the respective parties.

Now on this 6th day of November, 1958, briefs having been duly filed by the parties hereto, the above entitled matter is assigned for oral argument, the respective parties appearing as before.

Thereupon, the parties make their arguments to the Court and the Court takes said matter under advisement.

And now on this 30th day of December, 1958, the Court having duly considered the evidence introduced here-
 47 in, and the briefs and arguments of the parties hereto, and being duly advised in the premises finds that the priority claimed by the Small Business Administration should be denied, and the claim allowed only as an unsecured claim, and that the order of the Referee should be approved and affirmed for all of the reasons stated in the opinion of the Court this date filed herein.

Wherefore, It Is Considered And Ordered By The Court, That the claim of the Small Business Administration for priority be and it is hereby denied and said claim is allowed only as an unsecured claim, and that the order of the Referee be and it is hereby approved and affirmed.

Dated at Topeka, Kansas, this 28 day of January, 1959.

ARTHUR J. STANLEY, JR.
District Judge

Approved By:

JOHN Q. ROYCE

WILBUR G. LEONARD
United States Attorney

Filed January 28, 1959.

IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Jan. 29, 1959

Notice is hereby given that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order and Judgment of this Court entered herein on January 28, 1959,

pursuant to opinion of the Court rendered on December 30, 1958.

Dated this 29th day of January, 1959.

WILBUR G. LEONARD
United States Attorney
Attorney for Plaintiff

Filed Jan 29 1959 Harry M. Washington, Clerk By L. (illegible) Lutes Deputy.

48 Clerk's Certificate to foregoing Transcript
(omitted in printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

49 **Minute Entry of Argument and Submission of Case—
Sept. 10, 1959**

(omitted in printing)

50 IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 6117—September Term, 1959

SMALL BUSINESS ADMINISTRATION, *Appellant*,

v.

G. M. McCLELLAN, Trustee, *Appellee*.

In the matter of S. H. BYQUIST, and individual, doing
business as Western Distributors, Bankrupt.

Appeal from the United States District Court
for the District of Kansas

Opinion—November 6, 1959

Morton Hollander, Attorney, Department of Justice
(George Cochran Doub, Assistant Attorney General,
Wilbur G. Leonard, United States Attorney, and Samuel

D. Slade and Peter H. Schiff, Attorneys, Department of Justice, were on the brief) for Appellant.

John Q. Royce for Appellee.

Before BRATTON, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

51 In this bankruptcy proceeding the court below affirmed a referee's order allowing a claim of Small Business Administration as an unsecured claim and denying it any priority. The only question on appeal is the right to priority over other unsecured creditors.

The facts are not in dispute. Byquist, the bankrupt, applied on a Small Business Administration¹ form, entitled "Limited Loan Participation Application for Loan," to the Brookville State Bank of Brookville, Kansas, for a \$20,000 loan. On October 30, 1956, the Bank endorsed the application to show that it was willing to make the loan upon the participation of SBA therein to the extent of 75%. SBA agreed and on November 19, 1956, entered into a "Participation Agreement" with the Bank. Therein it was provided that upon written demand by the Bank SBA would purchase a 75% interest; that the Bank would hold the note and on five days written demand would transfer it to SBA; that the holder of the note would service it and remit promptly to the other party its pro rata share; and that SBA and the Bank were to bear any loss incurred ratably according to their respective interests in the loan.

52 On November 21, 1956, SBA sent the Bank its check in the amount of \$15,000 for the sole purpose of purchasing a 75% interest in the loan. The Bank then loaned \$20,000 to Byquist who executed and delivered a note payable to the Bank and made out an SBA form in which he agreed to use the loan proceeds solely for the purposes set out in the SBA loan authorization and to reimburse the "Holder" and SBA for expenses incurred by them in connection with the loan.

After the filing of an involuntary petition in bankruptcy, Byquist was adjudicated a bankrupt on September 5, 1957, and a trustee was duly appointed. The estate is valued

¹ Hereinafter referred to as SBA.

at approximately \$19,000 and the claims filed exceed \$43,000.

Subsequent to the date of bankruptcy, the Bank assigned the note to SBA which on October 15, 1957, filed a claim for the unpaid balance amounting to \$16,788.42 and claimed priority therefor.

At the outset we have the contention of the trustee that SBA is not an agency of the United States and hence is not entitled to any priority given the United States. In view of the disposition which we make of this case it is not necessary to consider that point. For the purposes hereof we assume that the claim belongs to and is made by the United States subject only to its agreement to share the loan proceeds and losses ratably with the Bank.

53 The issue is whether, at the date of bankruptcy, there was a debt which was due the United States within the meaning of R. S. § 3466² and which was for that reason entitled to a priority under § 64(a)(5) of the Bankruptcy Act.³

The note was made payable to the Bank and was held by the Bank on the date of bankruptcy. In *United States v. Margen*, 307 U.S. 200, it was determined that the United States was not entitled to priority on a claim based on a note which had been assigned after bankruptcy upon the payment by the Federal Housing Administrator of a loss under an insurance policy issued pursuant to the National Housing Act. This decision was followed in *In re Miller*, 2 Cir., 105 F. 2d 926-928, wherein it appeared that the bankrupt obligor had agreed to indemnify the United States for any loss it might sustain by reason of its insurance of the credit. Basically, the rights of the United States in each case were those of a subrogee whereas here the United States participated in the loan. Such participation is said to result in beneficial ownership of a part of the debt on the date of bankruptcy and, hence, to render

54 unimportant the fact of post-bankruptcy assignment.

On the facts of the case at bar we deem it unnecessary to decide whether the United States has any greater rights

² 31 U.S.C. § 191, which provides in part that "debts due to the United States shall be first satisfied" out of the estate of an insolvent debtor.

³ 11 U.S.C. § 104(a)(5), which allows a fifth priority to "debts owing to any person, including the United States, who by the laws of the United States is entitled to priority."

as a participant in a loan pursuant to the Small Business Act of 1953⁴ than it had as a subrogee under an insurance policy issued by it under the National Housing Act. The claim of the United States rests on the premise that it is asserting a debt covered by § 3466 and recognized by § 64(a)(5) of the Bankruptcy Act. While § 3466 must be construed liberally to effectuate its purpose to protect the public finances,⁵ the Court said in *Marxen* that:⁶

" * * * this principle of construction is subject to the limitation that the generality of the language of the section is restricted by the purpose to grant priority to the United States, only, and by legislative intention, as shown by other statutes."

In the Small Business Act of 1953, Congress declared the policy that the government should aid the interests of small business concerns "to preserve free competitive enterprise."⁷ To attain that end the administrator of the act is empowered, among other things, to make loans to small business concerns either directly or "in cooperation with banks * * * through agreements to participate * * *."⁸ Thus, the United States went to the financial aid of small business by the general extension of credit which otherwise would have been available only from private lending institutions. The United States entered upon a commercial venture which supplemented the activities of private business.

The argument is advanced that by so doing, the United States intended to forego the applicability of § 3466 because the assertion of the priority provided thereby would not benefit small business but would handicap it in its efforts to operate with private financing. The situation is said to be analogous to that considered in *United States v. Guaranty Trust Company of New York*, 280 U.S. 478, where

⁴ 15 U.S.C. §§ 631-647.

⁵ *United States v. Emory*, 314 U.S. 423, 426. Cf. *United States v. Johnson*, 10 Cir., 87 F. 2d 155, 161.

⁶ 307 U.S. 206.

⁷ 15 U.S.C. § 631(a).

⁸ 15 U.S.C. § 636(a).

debts incurred under the Transportation Act of 1920 were held to have no priority under § 3466, and distinguishable from *United States v. Emory*, 314 U.S. 423, where § 3466 was applied to certain transactions under the National Housing Act, the purpose of which was held to be not-
 56 the strengthening of the general credit of property owners but the stimulation of the business trades. Here again the intriguing arguments presented need not be resolved.

The determining fact is that SBA has by written contract with the Bank agreed to share ratably the proceeds and losses resulting from the transaction with Byquist.

Marxer holds that absent controlling legislation, which is not present here, § 3466 grants priority only to the United States. In *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 28, it was said that § 3466 may not be extended to create a priority for a claim which the United States is collecting for a private party. This principle would be violated if the claim of the United States were here given priority.

The United States is bound by its written contract to account to the Bank for the Bank's 25% share of any collection made under the note. Hence, the Bank would share to that extent in any proceeds resulting from the award of a priority to the United States. No such priority in a private creditor is provided by § 3466.

The Bankruptcy Act is intended to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands.⁹ The use of § 3466
 57 to prefer the Bank over the other private creditors would defeat that intent.

The United States has engaged in a commercial enterprise and made no effort to safeguard its rights under § 3466. In a contract made on its own forms it has agreed to share ratably proceeds and losses. It may not assert a priority which will produce a recovery that by contract must be divided with a private entity.

Affirmed.

⁹ *Kothe v. R. C. Taylor Trust*, 280 U.S. 224, 227.

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58

IN THE UNITED STATES COURT OF APPEALS

Judgment—Nov. 6, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed:

59 Clerk's Certificate to foregoing Transcript
(omitted in printing)

60

SUPREME COURT OF THE UNITED STATES.

No., October Term, 1959

(Title omitted)

**Order Extending Time to File Petition for Writ of Certiorari—
January 25, 1960**

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 24th, 1960.

CHARLES E. WHITTAKER
*Associate Justice of the
Supreme Court of the
United States.*

Dated this 25th day of January, 1960.

SUPREME COURT OF THE UNITED STATES

No. 729, October Term, 1959.

SMALL BUSINESS ADMINISTRATION, *Petitioner*,

v.

G. M. McCLELLAN, *Trustee***Order Allowing Certiorari—April 18, 1960**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.